RECORD AND BRIEFS

No. 17-130

# In the Supreme Court of the United States

RAYMOND J. LUCIA
AND RAYMOND J. LUCIA COMPANIES, INC.,
*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

### INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.[1]

Businesses are frequently respondents in enforcement actions by the Securities and Exchange Commission ("SEC"). The Chamber accordingly has an interest in ensuring that the power to preside over those proceedings and to affect the interests of those businesses is vested in officials who are constitutionally appointed.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

## SUMMARY OF ARGUMENT

The question presented in this case plainly warrants review by this Court. The issue is important; there is a square conflict among the lower courts; and the lower courts' conflicting holdings turn on differing interpretations of this Court's precedents—an issue that only this Court can resolve.

The Securities and Exchange Commission brought 692 administrative enforcement actions in fiscal year 2016—80% of all of the enforcement actions instituted.[2] Every one of those administrative proceedings was presided over by an administrative law judge ("ALJ") who was not appointed by the President or by the Commission. Every one of those proceedings therefore implicates the important question presented here regarding the application of the Appointments Clause.

The Appointments Clause protects against the manipulation and abuse of "the most insidious and powerful weapon of eighteenth century despotism"—"the power of appointment to offices." *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991). The Framers sought to prevent abuse of the appointment power by limiting the dispersion of that authority and ensuring that "those who wielded it were accountable to political force and the will of the people." *Id.* at 884. Thus, all officers—*i.e.*, any official "exercising significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976)—

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[2] Securities & Exchange Comm'n, Select SEC and Market Data Fiscal 2016 at 3 tbl. 2, https://www.sec.gov/files/2017-03/secstats2016.pdf.

must be appointed by the President "with the Advice and Consent of the Senate," or, in the case of inferior officers, by "the President alone, in the Courts of Law, or in the Heads of Departments," as directed by Congress. U.S. CONST. art. II, § 2, cl. 2.

This Court's precedents compel the conclusion that SEC ALJs are "officers" subject to the Appointments Clause. SEC ALJs exercise significant authority over the business community: They may preside over administrative proceedings brought by the SEC against *any* business or individual; in the course of those proceedings, they receive and rule on the admissibility of evidence, issue subpoenas, rule on dispositive and procedural motions, and regulate the course of the hearing; and at the conclusion of the proceedings, they may issue initial decisions that declare respondents liable and impose sanctions ranging from monetary penalties to barring individuals from associating with others in the securities industry. In 90% of proceedings, their initial decisions become final without any review or revision from an SEC Commissioner.

The three-judge panel of the D.C. Circuit instead eviscerated the structural safeguards of the Appointments Clause, holding that SEC ALJs are not officers who must be appointed in accordance with the Appointments Clause based solely on the fact that they do not possess the authority to enter final decisions; after an en banc rehearing, the D.C. Circuit split evenly, leaving in place the panel opinion. See D.C. Cir. R. 35(d).

The D.C. Circuit's misapplication of this Court's precedents places it directly at odds with the Tenth Circuit, which correctly held that SEC ALJs are "officers" subject to the Appointments Clause. See

*Bandimere* v. *S.E.C.*, 844 F.3d 1168, 1188 (10th Cir. 2016).

After *Bandimere*, the Commission stayed all administrative proceedings in which the respondent has the option of seeking review in the Tenth Circuit of the final order of the Commission, leaving the fate of those businesses and individuals in limbo; at the same time, the Commission continues to proceed administratively in large numbers against those businesses and individuals who happen to be located outside of the geographical bounds of the Tenth Circuit. *Amicus* respectfully submits that this Court's review of the decision below is warranted to ensure uniform—and proper—application of the Appointments Clause.

## ARGUMENT

### I. The Constitutional Standards Governing Appointment Of SEC ALJs Is An Issue Of National Importance.

Over the past decade, the number of enforcement proceedings presided over by SEC ALJs has dramatically increased—both in absolute terms and relative to the number of enforcement actions brought by the Commission as civil actions in court. That transformation results largely from statutory changes expanding the categories of persons who may be targeted through administrative actions and the remedies available to the Commission in such actions—as well as the Commission's well-documented higher rate of prevailing before its ALJs. This expansion in the use of proceedings over which ALJs preside—and the contemporaneous expansion in ALJs' powers—significantly increases the real-world importance of resolving the issue presented in this case.

### A. The Expanded Authority Of SEC ALJs.

Recent statutory changes have expanded both the reach of SEC administrative proceedings and the range of available sanctions.

Originally, the ability of the Commission to use administrative proceedings was limited: The Commission could proceed administratively only against registered entities, and could only obtain a "stop order" to halt an offering of securities to the public, see Securities Act of 1933 § 8, 48 Stat. 74, 79-80, or reject an application for or revoke the registration of a broker-dealer or investment adviser, see Securities Exchange Act of 1934 § 15, 48 Stat. 881, 895-96; Investment Company Act of 1940 § 203, 54 Stat. 789, 850-52.

In the ensuing decades, the powers and jurisdiction of the SEC ALJs expanded, but until 2009, the authority to impose monetary penalties against persons or entities not registered with the Commission remained for the most part with federal district courts. See, e.g., Securities Enforcement Remedies and Penny Stock Reform Act of 1990 §§ 102, 202-203, 301, 401, 104 Stat. 931, 933-35, 937-40, 941-44, 946-49. See also Andrew Ceresney, Dir., SEC Div. of Enforcement, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014) ("Ceresney 2014"), http://www.sec.gov/News/Speech/Detail/Speech/1370543515297 ("Until 2010, while we could proceed against unregistered persons in administrative proceedings, the relief that we could obtain against them was limited.").

In 2010, however, with the passage of the Dodd-Frank Act, the Commission gained the power to obtain through administrative proceedings virtually

the same relief—including substantial monetary penalties—against the same individuals and entities that it could sue in federal district court. See Ceresney 2014, *supra* p. 5 ("In the Dodd-Frank Act, * * * Congress provided us authority to obtain penalties in administrative proceedings against unregistered parties comparable to those we already could obtain from registered persons."); Jed S. Rakoff, PLI Secs. Reg. Institute Keynote Address, Is the S.E.C. Becoming a Law Unto Itself? (Nov. 5, 2014), http://assets.law360news.com/0593000/593644/Sec.Reg.Inst.final.pdf ("The net result of all this is that the S.E.C. can today obtain through internal administrative proceedings nearly everything it might obtain by going to court."); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P, 124 Stat. 1376, 1862-64.

Now the Commission can proceed administratively against *any* person or entity. See 15 U.S.C. §§ 77h-1, 78u-3(a), 80a-9(f), 80b-3(k). And it can obtain in those proceedings, *inter alia*, monetary and other civil penalties such as fines (including against unregistered persons), see *id.* §§ 77h-1(e), (g), 78u-2, 78u-3(e), 80a-9(d)-(e), 80b-3(i)-(k); cease and desist orders, see *id.* §§ 77h-1, 78u-3(a), 80a-9(f), 80b-3(k); and collateral bars prohibiting individuals from associating with entities regulated by the SEC, see *id.* §§ 78o(b)(6)(A), 78o-4(c)(4), 78q-1(c)(4)(C), 80b-3(f).

### B. The Commission's Increasing Use Of In-House Administrative Proceedings.

The expansion of the authority of SEC ALJs has been accompanied by a dramatic increase in the Commission's use of administrative enforcement proceedings as compared to civil actions in court.

That change was deliberate. In October 2013, Andrew Ceresney, then-Director of the Division of Enforcement, expressly signaled the Commission's intention to funnel enforcement actions into administrative proceedings before SEC ALJs as opposed to federal court, stating that "[o]ur expectation is that we will be bringing more administrative proceedings given the recent statutory changes." Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES, Oct. 5, 2013. A year later, he confirmed that "[t]here is no question that we are using the administrative forum more often now than in past years, given the changes under Dodd-Frank." Ceresney 2014, *supra* p.5; see *also* H.R. Rep. No. 114-697, at 2 (2016) ("This shift from litigation in court to administrative proceedings has occurred largely as a result of Section 929P of the [Dodd-Frank] Act, which expanded the SEC's authority to obtain civil penalties in administrative proceedings against any person or entity").

Indeed, "[p]ublicly available data indicate that in FY 2014, the SEC's Enforcement Division brought nearly half of its litigated actions as administrative proceedings, *an increase of over 35% since 2012*." H.R. Rep. No. 114-697, at 2 (emphasis added). And the trend toward administrative proceedings has continued: In fiscal year 2016, the percentage of enforcement actions brought as administrative proceedings rose to 80% of all enforcement actions (74% if follow-on administrative proceedings are excluded). SEC, Select SEC and Market Data Fiscal 2016 at 3 tbl. 2, https://www.sec.gov/files/2017-03/secstats2016.pdf; see also H.R. Rep. No. 114-697, at 2-3 ("[I]t has been reported that the SEC brought 82% of its enforcement actions as administrative proceedings, rather than federal-court cases, in the six months

ending in March 2015, representing an increase from less than half of those matters a decade earlier.").[3]

The types of cases presided over by SEC ALJs have changed as well. Prior to the Dodd-Frank Act, for example, the SEC had never brought an insider trading case before an ALJ. Now, however, the SEC regularly brings such cases before ALJs. See SEC, Select SEC and Market Data Fiscal 2016 at 3 tbl. 2; Sarah N. Lynch, *U.S. SEC to File Some Insider-Trading Cases in Its In-House Court*, REUTERS, June 11, 2014, http://www.reuters.com/article/sec-insider trading-idUSL2N0OS1AT20140611.

### C. The Commission's Home Court Advantage In Administrative Proceedings.

The Commission's increased use of in-house administrative proceedings before SEC ALJs has one undisputable result: the Commission prevails much more frequently. That materially and adversely affects the rights and interests of businesses and individuals subject to SEC enforcement actions and to SEC regulation more generally. But the absence of the clear responsibility required by the Constitution for the appointment of SEC ALJs clouds accountability for any biases in the administrative process.

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[3] The increase in the share of enforcement actions brought against public companies in administrative proceedings as opposed to in civil court actions is even more dramatic: In those actions, the percentage of enforcement actions brought in administrative proceedings increased from 34% in 2010 to 90% in 2016. NYU Pollack Ctr. for Law & Business, SEC Enforcement Activity Against Public Companies and Their Subsidiaries: Fiscal Year 2016 Update at 6, https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-Against-Public-Company-Defendants-2016.

The Commission enjoys a higher rate of success in its proceedings before SEC ALJs than in civil court actions. Between October 2010 and March 2015, the SEC won 90% of the cases it brought before its ALJs, as compared with 69% of cases before district court judges. Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J., May 6, 2015, https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803. It won *every one* of the 219 administrative decisions issued between October 2013 and January 2015. Ryan Jones, *The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 509 (2015).

Furthermore, administrative proceedings before ALJs differ from federal court cases in several ways that meaningfully impact the ability of defendants to present a full defense. For example, defendants have limited ability to obtain pre-hearing discovery, have a short period of time to prepare for a hearing, are not protected by the evidentiary safeguards of the Federal Rules of Evidence, and have no right to a jury trial. See Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1156-65, 1169-74 (2016) ("Grundfest"); see also H.R. Rep. No. 114-697, at 3; U.S. Chamber of Commerce, *Examining U.S. Securities and Exchange Commission Enforcement: Recommendation on Current Processes and Practices* at 14-17 (2015), http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf.

Of course, the SEC may take years to investigate and develop a case, during which time it has essentially unfettered authority to request documents and

interview witnesses. See Grundfest at 1158. The imbalance between the SEC and defendants in administrative proceedings has raised concerns about the fairness of such proceedings, which further underscores the importance of transparency and accountability in the conduct of the proceedings.

Moreover, the real-world impact of decisions by SEC ALJs extends beyond the individual enforcement actions over which the ALJs preside. Agencies, and particularly the SEC, have long used administrative proceedings to establish standards and policies outside of the formal rulemaking process. See David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 926 (1965); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201-03 (1947).

The increased use of administrative proceedings accordingly produces a correspondingly greater role for ALJs in agency policymaking. It also transfers responsibility for construing and interpreting the securities laws from federal courts to ALJs because federal courts reviewing administrative decisions defer to ALJs' legal conclusions. See Rakoff at 10-12; Grundfest at 1149, 1165-66. Indeed, the SEC's own internal guidance on forum selection recommends bringing an enforcement action as an administrative proceeding before an in-house ALJ, as opposed to as a civil action in court, if it "is likely to raise unsettled and complex legal issues under the federal securities laws, or interpretation of the Commission's rules." SEC, Division of Enforcement Approach to Forum Selection in Contested Actions at 3, https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf.

In view of the increasingly central role of SEC ALJs in adjudicating enforcement actions and shaping the policy and law governing individuals and businesses, it is all the more important that this Court resolve the question whether the Appointments Clause's significant structural safeguards apply to the appointment of those ALJs so that the public can easily discern and hold accountable the individual(s) responsible for their appointment—a question that, as described below, has divided the lower courts.

## II. The Petition Cleanly Presents A Circuit Conflict That Is Ripe For Resolution.

In the *per curiam* decision below, an evenly-divided D.C. Circuit rejected petitioners' argument that their petition for review should be granted because SEC ALJs are "Officers" who must be appointed in compliance with the Appointments Clause, leaving in place the opinion of the three-judge panel of the D.C. Circuit holding that lack of final decisionmaking authority by itself disqualifies SEC ALJs from being "Officers" subject to the Appointments Clause.

The Tenth Circuit, in *Bandimere* v. *SEC*, addressed "the same question" as the court below—whether SEC ALJs are "Officers" subject to the Appointments Clause—and reached the opposite conclusion: "SEC ALJs are inferior officers who must be appointed in conformity with the Appointments Clause." 844 F.3d at 1181.

As a result of the circuits' divergent opinions, whether or not businesses and individuals are assured that their rights and interests will be determined by an official appointed according to the dic-

tates of the Appointments Clause depends on their geographic location. The disparate effect on businesses and individuals of this split is already apparent.

The Commission has stayed all administrative proceedings reviewable in the Tenth Circuit. *See* Order, *In re Pending Administrative Proceedings*, Securities Act of 1933 Release No. 10365 (May 22, 2017). But it continues to bring enforcement actions before SEC ALJs against respondents located outside of the Tenth Circuit. *See* U.S. SEC, Administrative Proceedings, https://www.sec.gov/litigation/admin.shtml; *see also* Order Denying Motion to Stay Administrative Proceeding, *In the Matter of Tilton*, Investment Advisers Act of 1940 Release No. 4735 (July 28, 2017).

Moreover, the conflict between these lower courts turns on the proper interpretation of this Court's Appointments Clause precedents—in particular *Freytag* v. *Comm'r*, 501 U.S. 868. The D.C. Circuit panel's decision rested on a severely restrictive interpretation of "Officers" that "begins, and ends" with whether an official has the authority to issue final decisions. Pet. App. 13a. That interpretation was in turn based on the D.C. Circuit's view that the authority to issue final decisions "'was critical to the Court's decision' in *Freytag*" that special trial judges are "Officers." *Id.* 12a.

The Tenth Circuit expressly "disagree[d]" with the D.C Circuit panel's elevation of final decision-making power as the dispositive factor in determining whether an official is an "Officer" for purposes of the Appointments Clause. *Bandimere*, 844 F.3d at 1182. "Whether SEC ALJs can enter final decisions

is not dispositive to our holding because it was not dispositive to *Freytag*'s holding." *Id.* at 1184 n.36.

Only this Court can resolve the conflict. Additional lower court decisions are most unlikely to provide new insights into the meaning of the Court's opinion in *Freytag*. The Court should grant review to resolve the issue and ensure uniform national application of the protections of the Appointments Clause. See *Bullock v. BankChampaign*, N.A., 133 S. Ct. 1754, 1761 (2013) ("[I]t is important to have a uniform interpretation of federal law").

## III. The Decision Below Conflicts With This Court's Precedent.

### A. The Appointments Clause Applies To All Officials Who Exercise Significant Authority.

This Court has consistently recognized that the Appointments Clause of the U.S. Constitution has "substantive meaning" and for good reason. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). The Constitution's separation of powers, with its attendant checks and balances, is "essential to the preservation of liberty," and also ensures that "[a] dependence on the people" is the "primary control on the government." THE FEDERALIST NO. 51, at 261-262 (James Madison) (Garry Wills ed., 1982).

The Framers recognized that when the appointment power is dispersed among multiple people, "[s]candalous appointments to important offices" are made, and it is impossible to "determine by whose influence [the people's] interests have been committed to hands so unqualified, and so manifestly improper." THE FEDERALIST NO. 70 at 359 (Alexander Hamilton). The Constitution therefore "carefully hus-

band[s] the appointment power to limit its diffusion," *Freytag*, 501 U.S. at 883, and thus permits the people to "determine what part had been performed by the different actors," THE FEDERALIST NO. 77 at 389 (Alexander Hamilton). With respect to "inferior Officers," the Appointments Clause grants Congress "only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law." *Freytag*, 501 U.S. at 884. The Clause thereby ensures that those wielding the appointment power are "accountable to political force and the will of the people." *Id.* at 884.

Consistent with this history, the Court has held that "any appointee exercising significant authority pursuant to the laws of the United States" is an "Officer of the United States" who must be appointed in accordance with the terms of the Appointments Clause of the U.S. Constitution. *Buckley*, 424 U.S. at 126; see also *id.* at 132 ("Unless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the Clause." (emphasis added)); *Freytag*, 501 U.S. at 881.

The class of officials covered by the Clause has been described as "unusually broad," and including among others a district court clerk, the "thousands of clerks in the Departments of the Treasury, Interior and the othe[r] departments," a "clerk to the assistant treasurer stationed at Boston," an "assistant-surgeon," and a "cadet-engineer." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 539-40 (2010) (Breyer, J., dissenting) (internal quotation marks and citations omitted).

Of particular relevance to SEC ALJs is this Court's holding in *Freytag* that special trial judges of the U.S. Tax Court are "inferior officers" based on

the "significance of the duties and discretion that [they] possess." 501 U.S. at 881-82. The Court relied on the fact that special trial judges "perform more than ministerial tasks"; they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders," and exercise significant discretion in carrying out those "important functions." *Id.*[4]

Since *Freytag*, the Court has also held—virtually summarily—that military judges are officers subject to the Appointments Clause. See *Edmond* v. *United States*, 520 U.S. 651, 662 (1997); *Weiss* v. *United States*, 510 U.S. 163, 169-70 (1994).

### B. SEC ALJs Are "Inferior Officers" Under The Appointments Clause.

The Court's precedents cannot be reconciled with the decision below rejecting petitioners' argument that their petition for review should be granted because SEC ALJs are "Officers" required to be appointed in compliance with the Appointments Clause.

*Freytag* is dispositive: The authority and discretion of SEC ALJs are indistinguishable from the duties of the special trial judges that the *Freytag* Court found sufficiently "significan[t]" to render special trial judges "officers" under the Appointments Clause. 501 U.S. at 881-82.

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[4] The Court held in the alternative that "[e]ven if the duties of special trial judges" in cases in which they did not have final decision-making authority "were not as significant as [it had] found them to be," the judges' authority to enter final decisions in other cases would suffice to make them "officers." *Id.* at 882.

The SEC has delegated to ALJs responsibility for the "fair and orderly conduct of [administrative] proceedings," 17 C.F.R. § 200.14(a), and thereby empowered the ALJs to "perform more than ministerial tasks," *Freytag*, 501 U.S. at 881.[5] An SEC ALJ has "authority to do all things necessary and appropriate to discharge his or her duties." 17 C.F.R. § 201.111. As the petition explains, that includes, but is not limited to: issuing, revoking, quashing, and modifying subpoenas; receiving evidence and ruling on the admissibility of evidence and offers of proof; regulating the course of a proceeding and the conduct of the parties and their counsel; examining witnesses; ordering and regulating document production and depositions; ruling on all procedural and other motions; sanctioning contemptuous conduct; and preparing an initial decision containing factual findings and legal conclusions, the reasons or basis thereof, and an appropriate order, sanction, and relief. *Id.* §§ 200.14(a), 201.111, 201.180, 201.230, 201.233, 201.360; see also 5 U.S.C. § 557(c). See generally 5 U.S.C. § 556(c).

The ALJ's initial decision is "deemed the action of the [SEC]," unless a party or other person entitled to review files a timely petition for review or the SEC on its own initiative exercises its discretionary right to review. 15 U.S.C. § 78d-1(c); see also 17 C.F.R. § 201.360(d); 5 U.S.C. § 557(b). Even in those cases

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[5] Like the office of special trial judge, the office of SEC ALJ is established by law. The Administrative Procedure Act creates the office of the administrative law judge, and sets forth the ALJ's duty of presiding over adjudicatory hearings. 5 U.S.C. §§ 556, 557; see also *id.* §§ 3105, 5372 (setting forth means of appointment and salary). The federal securities laws, in turn, authorize the SEC to "delegate . . . any of its functions to . . . an administrative law judge." 15 U.S.C. § 78d-1(a).

in which a party appeals the ALJ's decision, the SEC retains discretion to decline to review the ALJ's decision, except in a few specified circumstances. See 17 C.F.R. § 201.411(b). As a practical matter, 90 percent of ALJ initial decisions become final without review by the SEC. See *Bandimere*, 844 F.3d at 1187.

In other words, SEC ALJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders."[6] *Freytag*, 501 U.S. at 881-82. And "[i]n the course of carrying out these important functions, the [ALJs] exercise significant discretion." *Id.* at 882. These characteristics, which compelled the Court in *Freytag* to find special trial judges of the Tax Court to be "Officers" subject to the Appointments Clause, likewise compel the conclusion that SEC ALJs are "Officers."

The D.C. Circuit panel rested its contrary decision on its conclusion that these ALJs lack the authority to issue final decisions. Pet. App. 13a.

But *Freytag* squarely *rejected* the argument that "special trial judges may be deemed employee in [certain cases] because they lack authority to enter a final decision." 501 U.S. at 881. That view, the Court held, "ignore[d] the significance of the duties and discretion that special trial judges possess" (*id.*)—which, as explained above, SEC ALJs likewise possess.

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[6] Although SEC ALJs do not have the power to impose fines or imprisonment for contempt, they have the authority to impose other sanctions for contemptuous conduct. See 17 C.F.R. § 201.180.

To be sure, after the Court found that special trial judges were officers based on their role and discretion in regulating the trial process, it went on to set forth a separate and independent basis for finding the judges to be officers. "*Even if* the duties of special trial judges" were not as significant as the Court had just found them to be—and thus not sufficient by themselves to render special trial judges officers—"our conclusion" that special trial judges are inferior officers "would be unchanged" because special trial judges have the authority to enter final decision in some categories of cases. *Id.* at 882 (emphasis added).

That authority, the Court explained, was sufficient to categorize special trial judges as inferior officers in all cases, even if the Court assumed that in some cases the judges had neither final decision-making authority nor other significant duties. *Id.* In other words, *Freytag* stands for the proposition that final decision-making authority in some matters would be sufficient to make an official an "officer" for all purposes, even where his other functions are not "significant." But final decision-making authority in all matters is not necessary for "officer" designation.

Subsequent cases confirm this reading of *Freytag*. In *Weiss* v. *United States*, decided just a few years after *Freytag*, this Court held that military judges qualify as officers subject to the requirements of the Appointments Clause. See 510 U.S. at 170.[7]

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[7] The precise issue in *Weiss* was whether the Appointments Clause requires military officers to obtain a separate appointment before serving as military judges. The Court noted that the parties agreed "rightly so" that the Appointments Clause applied to the military judges. 510 U.S. at 170.

Military judges "rule[] on all legal questions, and instruct[] court-martial members regarding the law and procedures to be followed," and, where the accused elects, decide guilt or innocence and impose sentences. *Id.* at 167-68.

However, "[n]o sentence becomes final until approved by the officer who convened the court-martial," and the judges' factual findings, legal rulings, and sentences are subject to *de novo* review by the Courts of Military Review. *Id.* at 167-68; see also *id.* at 193 (Souter, J., concurring); 10 U.S.C. §§ 864, 866, 869. Notwithstanding the military judges' inability to enter final decisions, the Court held that "because of the authority and responsibilities they possess," military judges "act as 'Officers' of the United States." *Weiss*, 510 U.S. at 169.

Similarly, in *Edmond* v. *United States*, this Court held that judges on the Coast Guard Court of Criminal Appeals[8] are inferior officers for purposes of the Appointments Clause. 520 U.S. at 666. The Court expressly recognized that those judges "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665. Nevertheless, the Court "[did] not dispute that military appellate judges are charged with exercising significant authority on behalf of the United States," which rendered them officers under the Appointments Clause. *Id.* at 662.

Indeed, the Court recognized that being subject to review is inherent to the definition of an "inferior

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[8] The Courts of Military Review were renamed the Courts of Criminal Appeals. *See* National Defense Authorization Act for Fiscal Year 1995, § 924, 108 Stat. 2663, 2831 (1994).

officer," who is subject to the Appointments Clause: "[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663.

Thus, in both *Weiss* and *Edmond*, this Court confirmed that the authority to enter final decisions is relevant to distinguishing *inferior* officers from *principal* officers, not to distinguishing inferior officers from mere employees whose appointments are not subject to the strictures of the Appointments Clause. The decision below cannot be squared with these precedents, and the interpretation of the Clause that it embraced unjustifiably excludes scores of officials with significant influence over the interests of the people from the accountability-preserving protections of the Appointments Clause.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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